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CITATIONS.

CASES.

STATUTES.

Supreme Court of the United States.

No. OCTOBER TERM, 1953.

DANIEL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Daniel Smith, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on February 26, 1954.

Opinion Below.

The opinion of the Court of Appeals (R. 257) is reported in 210 F.2d 496.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 26, 1954 (R. 264). A petition for rehearing filed on March 12, 1954 (R. 265-266) was denied on

delivery to the Government had been accomplished by such an inducement as would render it inadmissible (R. 124-125). The request for a preliminary hearing was opposed by the Government on the ground that it was not a confession but an "admission against interest", (R. 125); the trial judge then let it stand conditionally admitted as it was, (R. 126) and later instructed the jury only on the question of fraud (R. 210).

This statement, as the Court of Appeals pointed out, if given its full import, "accurately fixed [petitioner's] net worth as of December 31, 1945, and revealed substantial increases in his net worth above what he reported as taxable income in his tax returns for the years in issue." (R. 260-261).

There was convincing evidence that the statement was delivered only in reliance on criminal immunity from the tax evasions disclosed therein. The Treasury Agent, McMahon, who obtained the statement from Delaney, the petitioner's accountant and a former Treasury Agent, knew that Delaney was going to give him a check along with the statement some time prior to its delivery (R. 90-92). On June 13, 1952, McMahon accepted the statement and a check for $15,000 from Delaney, (R. 66-67); on June 14, 1952, after consulting with superiors and photostating the check, he mailed it back to Delaney, stating in the covering letter:

> "As you already know, where possible prosecution may be recommended, no payment of taxes is accepted until that feature of the investigation is ended." (R. 94, 235).

For the purpose of fixing the net worth of the petitioner at the start of the period involved, the opinion of the Court of Appeals relied primarily on the financial statement. As

corroboration for the starting net worth, the opinion relied on (1) evidence relating to tax returns filed immediately prior to the period, (2) evidence that from 1941 to 1945 the petitioner had worked for $40 a week, and (3) evidence that the petitioner's wife was a housewife from 1943 to the end of 1950 (R. 262). The testimony as to the tax returns was given by a government employee having custody of tax returns, no amounts of income were mentioned, the returns themselves had apparently been destroyed, and the evidence was only to the effect that no records of returns for 1936 through 1939 were found, non-taxable returns were filed for 1940 and 1942, a taxable return for 1941, a non-assessable return for 1943 and a refundable return for 1944 (R 26-27). The evidence as to the petitioner's income from 1941 to 1945 was itself the oral admission of the petitioner to a Treasury Agent (R. 63). The evidence that his wife was a housewife does not seem very probative on the issue, especially in view of the trial judge's finding that the Government had completely failed to establish a starting position as against her (R. 184).

The Government stated at a pretrial hearing that it had no evidence or proof by which it could segregate income between the two defendants (R. 13-14). The Government, of course, had the net worth statement submitted by the petitioner in its possession at that time. At the trial, in addition to tax returns and written and oral admissions of petitioner, the bulk of the testimony related to assets in the name of Eva Smith and computations of tax made thereon; the Government made no effort to allocate the actual ownership as between the two defendants (R. 259) and, in fact, several times seemed to concede that assets standing in Eva's name were actually owned by her (R. 42, 46, 118). In the trial judge's charge to the jury he clearly stated that "the Government has set out to show you

through circumstantial evidence that this crime or these crimes have been committed." (R. 211); no reference was made to the petitioner's net worth statement as a confession, and nothing was said in any manner about corroborating evidence. During the charge, as well as during the lengthy testimony of Government expert witness Toohey and arguments of counsel, the petitioner's net worth statement was not before the jury, but a blackboard was. On this blackboard had been recorded all of the evidence as to assets, showing a total increase in net worth during the indictment period of $232,966.72 (R. 216-217). If anyone can ever be certain about what goes on in the minds of twelve people, it is certain that the jurors convicted the petitioner on the basis of the evidence recorded on that blackboard.

The financial statement which had been submitted by the petitioner was used by the Government to establish a beginning net worth against the petitioner; it seems never to have been conceived of at the trial by either the Government or the trial judge as establishing the basic elements of the crimes alleged. In fact, the Government vigorously rejected the argument that it was a confession (R. 135).

The Court of Appeals, however, as has been pointed out, took a different view and found in the statement almost everything needed to sustain the conviction except corroboration. The Court of Appeals sustained the conviction on a theory never advanced by the Government at any stage of the proceedings. The closest the Government ever came to the position adopted by the Court of Appeals was in its brief before that court. There, for the first time in the case, mention was made of the averment by the petitioner that it was an accurate representation of "my true worth" and some significance was attached to it. The petitioner had contended that the evidence was insufficient to sustain his

conviction because evidence of Eva Smith's ownership of assets had not been made relevant to the issue of the guilt of the petitioner; in fact, such evidence had been limited to Eva Smith at times when counsel for the petitioner had specifically requested it, (R. 29, 106), and, upon counsel's observation that he would have the same objections throughout, the trial judge had told him "All right. I will protect your interests each time." (R. 30). The Government in its brief pointed to the fact that many of the assets listed on the financial statement were in Eva Smith's name, and sought by the use of the "my true worth" phrase to justify an inference that all of Eva Smith's assets actually belonged to the petitioner. However, it still clung to the position that the case had been proved by the evidence of assets which had been introduced.

Reasons for Granting the Writ.

Introduction.

The petitioner advances to this Court three principal reasons for granting the writ in this case.

First: The opinion below is in direct conflict with the opinion of the Court of Appeals for the Ninth Circuit in *Calderon* v. *United States*, 207 F.2d 377 (1953), petition for certiorari filed February 4, 1954. It is submitted that the court which decided that case would have reversed the conviction of the petitioner for the lack of adequate corroboration of the beginning net worth.

Second: The procedure and the standards adopted in the admission of the financial statement and its submission to the jury conflict with well-established precedents of this Court in that:

(a) The failure of the trial judge to hold a preliminary hearing in the absence of the jury on the admissibility of the statement conflicts with settled rules of this Court, *e.g. Carignan* v. *United States*, 342 U.S. 36, 38 (1951).

(b) Both the trial court and the Court of Appeals ignored the rule that a confession is inadmissible if obtained by reasonable reliance on a promise of immunity.

(c) In stating that the statement was submitted to the jury on proper instructions, the opinion of the Court of Appeals failed to consider that the jury, under the instructions given to it, may have convicted the petitioner while rejecting the statement and, therefore, was in error in failing to examine the sufficiency of other evidence. Cf. *Stein* v. *New York*, 346 U.S. 156 (1953)

Third: The theory on which the Court of Appeals sustained the conviction of the petitioner was not the theory on which the case was tried or on which the jury was instructed. The opinion below is in clear conflict with opinions of this Court, e.g. *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949) and of the Court of Appeals for the Sixth Circuit in *Pearson* v. *United States*, 192 F.2d 681 (1951).

Corroboration of the beginning net worth.

In *Calderon* v. *United States*, 207 F.2d 377, the Ninth Circuit Court of Appeals reversed a conviction in a net worth tax case for lack of independent proof of the cash on hand at the beginning of the period involved, finding a sworn statement given by the defendant to tax officials and to his accountant insufficient. Here there are also a

sworn statement and oral admissions to tax officials, there is no statement to an accountant, and there is in addition only the extremely vague and inconclusive testimony as to the tax returns. It is submitted that this tax return evidence, set out *supra* at page 5, is not sufficiently probative to supply the necessary corroboration.

Use of the returns as corroboration is in any event in conflict with *Spriggs* v. *United States*, 198 F.2d 782 (9 Cir. 1952), as it is there stated that all extrajudicial statements require corroboration, and the returns themselves are extrajudicial statements.

The financial statement: its admission in evidence and its submission to the jury.

The trial judge may have treated the contentions of the petitioner as to the admissibility of petitioner's financial statement as he did because of the argument of the Government at the trial that it was merely an admission and because of his own and the Government's conception of the case as one to be proven by circumstantial evidence. This cannot, however, be the rationale of the opinion of the Court of Appeals. Not only is it evident from a reading of the opinion that the court considered it as a confession, but the opinion also cites in its consideration of the point two cases dealing explicitly and unmistakably with confessions, *Wilson* v. *United States*, 162 U.S. 513 (1896) and *Williams* v. *United States*, 189 F.2d 693 (1951). The opinion, therefore, must stand, if this Court does not see fit to review it, as authority on the admissibility of confessions.

The first question raised by the opinion is whether or not the admission of confessions induced by a promise is to follow the same procedure as the admission of coerced confessions. It is abundantly clear that a defendant, who claims that a confession was coerced from him, is entitled to a

preliminary hearing on its admissibility before the trial judge in the absence of the jury at which he may testify, *Carignan* v. *United States*, 342 U.S. 36, 38 (1951). It is submitted by the petitioner that the same hearing should be accorded a defendant who claims that the confession was induced by a promise of immunity. The confessions are in both circumstances equally untrustworthy and prejudicial, perhaps even more prejudicial where given voluntarily to secure the promised immunity, and no distinction warranting a difference in treatment has been found in the opinions of this Court.

Even more important, however, in the development of the law in this area is the fact that the opinion regards coercion or compulsion as the only basis for the exclusion of a confession. "There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson* v. *United States*, 162 U.S. 613 (1896)". (R. 260) The opinion in this manner deals with the question of admissibility, and nowhere mentions the petitioner's contentions as to the inducement for the confession.

Citation of authority for the proposition that a confession induced by reasonable reliance on a promise of immunity is inadmissible does not seem necessary. The *Wilson* case itself states that the test of admissibility is that the confession be made "without compulsion or inducement of any sort". 162 U.S. at 623. If this rule of law is to be changed so drastically, it should be done by this Court; if it is not to be changed, the opinion below should be reviewed and corrected. In either event the writ should be granted.

Finally, the opinion below has ignored the views of this Court as expressed in *Stein* v. *New York*, 346 U.S. 156 (1953), where the Court found it necessary extensively to consider other evidence where the defendant had contended that a confession had been improperly admitted.

In its opinion in this case the Court of Appeals determined that there was a conflict in evidence as to whether the statement was obtained from the petitioner through fraud or deceit on the part of the agent. It was then stated that the statement was, however, submitted to the jury under instructions that they might reject it (R. 260). As the jury was *not* instructed that it would have to acquit the petitioner if it rejected the statement, it is impossible to say whether or not the statement was in fact rejected. Especially since the case was submitted to the jury as one of circumstantial evidence, it is probable that the jury convicted on that circumstantial evidence, and failure to examine that evidence for probative value, relevance, and sufficiency is a refusal to grant to the petitioner the review of his conviction to which he is entitled.

The error of the Court of Appeals lies in the fact that it is not a question of the jury believing or disbelieving some evidence, in which case the appellate court would be entitled to look at the evidence in the light most favorable to the prosecution, but it is rather a question of whether or not the evidence was admissible. It may be that the conviction was sustained on the basis of evidence which the jury found to be inadmissible.

Since this point was apparently not made sufficiently clear in *Stein* v. *New York*, supra, although it is implicit in that opinion, it is submitted that the Court should grant the writ in order to correct the inconsistent view taken by the Court of Appeals.

The variance between the theory of the trial court and the theory of the Court of Appeals.

The opinion of the Court of Appeals makes it clear that the conviction was there sustained on the basis that the petitioner's net worth statement constituted a confession

and that there was sufficient corroborating evidence of the confession to take the case to the jury. It is equally clear from the record of the trial that the case was actually not so submitted to the jury and that, although the evidence on which the Court of Appeals relied was in the case, it was not on that evidence that the jury returned the conviction.

The petitioner realizes that it is not the function of this Court, especially at this stage of the proceedings, to examine very closely into the record. It is submitted, however, that there is no real dispute as to the manner in which the case was presented to the jury, and that the variance between the basis for conviction as seen by the judge and prosecution at the trial and the view taken by the Court of Appeals raises a clear question of law.

In *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949), the defendant had been convicted of a conspiracy and of several substantive offenses. The case had been tried and submitted to the jury on the theory that the defendant had been an aider and abettor of the substantive offenses. The Court of Appeals, however, sustained the convictions on the theory that these offenses were committed in furtherance of the conspiracy and that, therefore, the defendant could be found guilty of committing them even though he did no more than join the conspiracy. The defendant contended before this Court that this was erroneous for the reason that a verdict on that theory would require submission of fact issues to the jury which were not submitted to it. Although the Court was divided five to four, all of the justices agreed that the defendant's contention was correct, the split coming only on the propriety of affirming on the aiding and abetting theory originally submitted to the jury by the trial judge.

There was absolutely nothing in the charge to the jury in this case, (R. 207-212), about the weight to be accorded

confession testimony or the amount of corroboration required. The case was submitted to the jury only as one based on circumstantial evidence. The opinion of the Court of Appeals is, therefore, in clear conflict with the opinion of this Court in the *Nye & Nissen* case.

The opinion below is also in conflict with *Pearson* v. *United States*, 192 F.2d 681 (6 Cir. 1951) where the court refused to sustain a conviction on a theory advanced by the Government for the first time on appeal, primarily on the ground that the charge to the jury did not cover properly the elements of guilt under the new theory.

Finally, the Court's attention must be called to the treatment of the phrase "my true worth" in the petitioner's financial statement. It is clear, especially as the statement was headed on its cover and on each of its pages "Daniel and Eva Smith", that the opinion of the Court of Appeals could have been written as it was only by relying heavily on that phrase to establish that the petitioner had himself realized substantial increases in his net worth above that which had been reported in his tax returns. But this phrase appears in the record prior to the Court of Appeals opinion only in the exhibit itself (R. 231). The phrase was never mentioned at the trial. The judge ignored it completely in the charge to the jury. The petitioner could have had no reason to suspect that any significance would be attached to it in view of the Government's manifest reliance on the statement only to establish the beginning net worth of the defendants. In *Shepard* v. *United States*, 290 U.S. 96 at 103 (1933), Mr. Justice Cardozo strongly indicates the fundamental unfairness of using testimony "in an appellate court as though admitted for a different purpose, unavowed and unsuspected." Here the petitioner was given

no reason at any stage of the proceedings from the hearing on the Bill of Particulars to the charge to the jury to suspect that the phrase "my true worth" would turn out to be the keystone in the case against him.

Conclusion.

For the reasons advanced herein, it is respectfully submitted that the Court should grant the writ of certiorari.

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